

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

JOHN J. HOUGHTON,
Appellant,

v.

DEPARTMENT OF THE ARMY,
Agency.

DOCKET NUMBER
BN07529010232

DATE: DEC 09 1992

John J. Houghton, Woburn, Massachusetts, pro se.

Bernice A. Pasternak, Watertown, Massachusetts, for the
agency.

BEFORE

Daniel R. Levinson, Chairman
Antonio C. Amador, Vice Chairman
Jessica L. Parks, Member

OPINION AND ORDER

The appellant has petitioned for review of an initial decision, issued September 17, 1990, that dismissed his appeal for lack of jurisdiction. For the reasons discussed below, we DISMISS the appellant's petition as untimely.

BACKGROUND

The agency removed the appellant from his position as a Materials Engineering Technician, effective July 30, 1990. On appeal to the Board's regional office, the administrative judge found that the appellant had waived his right to appeal

his removal under the terms of a last-chance settlement agreement, and issued an initial decision dismissing the appeal for lack of jurisdiction. The initial decision contained the following notice:

This initial decision will become final on October 22, 1990, unless a petition for review is filed by that date or the Board reopens the case on its own motion. This is an important date because it is the last day on which you can file a petition for review with the Board. The date on which the initial decision becomes final also controls when you can file a petition for review with the Court of Appeals for the Federal Circuit. The paragraphs that follow tell you how and when to file with the Board or the federal court. These instructions are important because if you wish to file a petition, you must file it within the proper time period.

The appellant filed a petition for review with the Clerk of the Board on April 23, 1992, a year and a half after the deadline specified in the initial decision. The Clerk of the Board notified the appellant that his petition would be dismissed unless he filed a motion for waiver of the time limit and supported it with an affidavit or a statement signed under penalty of perjury stating why there was good cause for the late filing.¹ The appellant provided a sworn statement² giving the following reasons for his delay in filing: (1) The

¹ The Clerk of the Board also advised the appellant that the petition was deficient in that the appellant did not serve a copy of the petition on the agency and did not submit a certificate of service to the Board. The appellant corrected these deficiencies within the time specified by the Clerk.

² Although the sworn statement was not provided within the time limit initially set by the Clerk, or within the time limit set by a second show-cause notice, it was filed within the time set by the Clerk in an oral approval of the appellant's request for an extension of time.

inadequate assistance of his union; (2) his inability to hire proper legal assistance because of financial circumstances; and (3) his belief that he had no recourse until he recently spoke to staff members of his congressman, who advised him that he might be able to have his appeal reopened.³

ANALYSIS

A petition for review must be filed within 35 days after the issuance of the initial decision. 5 C.F.R. § 1201.114(d). The Board will waive this time limit only upon a showing of good cause for the delay in filing. 5 C.F.R. §§ 1201.12, 1201.114(f). To establish good cause for an untimely filing, a party must show that he exercised diligence or ordinary prudence under the particular circumstances of the case. *Alonzo v. Department of the Air Force*, 4 M.S.P.R. 180, 184 (1980).

The initial decision contained explicit instructions as to how and when to file a petition for review with the Board. The appellant's failure to follow these straightforward directions shows that he did not exercise the diligence or ordinary prudence necessary to establish good cause for his untimely filed petition for review. See *Willis v. U.S. Postal Service*, 43 M.S.P.R. 439, 440, *aff'd*, 907 F.2d 158 (Fed. Cir. 1990) (Table). Further, the appellant's inability to secure

³ The appellant also cited his misunderstanding regarding Board procedures just prior to filing his appeal and while his appeal was pending in the regional office. No misunderstanding on his part during this period of time could establish good cause for his later delay in filing a petition for review.

legal counsel and the alleged inadequacy of his union representation do not establish good cause for his delay in filing. See *Robinson v. Veterans Administration*, 33 M.S.P.R. 483, 486 (1987) (the inability to obtain legal assistance does not establish good cause for an untimely filing); *Sofio v. Internal Revenue Service*, 7 M.S.P.R. 667, 670 (1981) (the appellant is responsible for the errors of his chosen representative).

ORDER

This is the final order of the Merit Systems Protection Board concerning the timeliness of the appellant's petition for review. The initial decision will remain the final decision of the Board with regard to the merits of the case. 5 C.F.R. § 1201.113.

NOTICE TO APPELLANT

You have the right to request the United States Court of Appeals for the Federal Circuit to review the Board's final decision in your appeal if the court has jurisdiction. See 5 U.S.C. § 7703(a)(1). You must submit your request to the court at the following address:

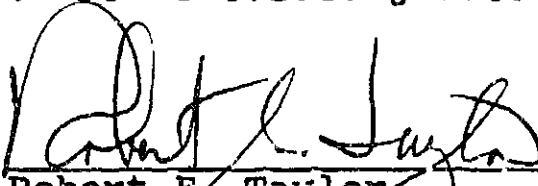
United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 30 calendar days after receipt of this order by your

representative, if you have one, or receipt by you personally,
whichever receipt occurs first. See 5 U.S.C. § 7703(b)(1).

FOR THE BOARD:

Washington, D.C.



Robert E. Taylor
Clerk of the Board